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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

ELOQUI VOICE SYSTEMS, LLC,

Plaintiff,

v.

NUANCE COMMUNICATIONS,
INC., a Massachusetts corporation,

Defendant.

Case No. 2:17-cv-00890-JAK-SS

**DEFENDANT NUANCE
COMMUNICATIONS, INC.'S
NOTICE OF MOTION AND
MOTION UNDER FRE 702 &
DAUBERT TO EXCLUDE EXPERT
TESTIMONY OF DRS. WALTERS
& CHASKI; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: OCTOBER 22, 2018
Time: 8:30 am
Place: Courtroom 10B

Hon. John A. Kronstadt

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on October 22, 2018 at 8:30 a.m., or as soon thereafter as the matter may be heard in Courtroom 10B at the United States Courthouse, 350 West First Street, Los Angeles, CA 90012, before the Honorable John H. Kronstadt, Defendant Nuance Communications, Inc. (“Nuance” or “Defendant”) will and hereby move the Court for an order striking the expert reports of Drs. Walters and Chaski, and precluding Drs. Walters and Chaski from testifying at trial or otherwise in this matter.

The motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, supporting declaration and exhibits, all other pleadings, papers and evidence on file in this matter, and any such matters as the Court may consider at the time of the hearing on this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on August 8, 2018.

Dated: August 15, 2018

By: Rachael D. Lamkin

Rachael D. Lamkin

Attorneys for Defendant
NUANCE COMMUNICATIONS, INC.

TABLE OF CONTENTS

I.	INTRODUCTION	5
II.	LEGAL PRINCIPLES.....	6
III.	ARGUMENT.....	7
A.	Drs. Walters & Chaski Are Not POSITA.....	7
B.	Drs. Walters & Chaski Never Reviewed The Actual Accused Product Or Its Software.....	10
C.	There Is No Accepted Methodology For Personality Typing In The Field Of Linguistics.....	11
D.	Dr. Chaski’s Testimony Is Subjective, Not Based On Any Accepted Methodology, & Ignores The Court’s Claim Construction.....	12
E.	Dr. Walters Admits That His (And Dr. Chaski’s) Opinions Are Subjective And Not Scientific.....	17
F.	Actual Experts Have Determined That The Connection Between Language and Personality Type Is Scientifically “Weak”.....	17
G.	Dr. Walters’ Methodology And Opinions Were Devised For This Litigation.....	18
IV.	DR. WALTERS’ “REBUTTAL INVALIDITY REPORT” IS A RUSE.	19
V.	CONCLUSION.....	24

TABLE OF AUTHORITIES

<i>Arthur A. Collins, Inc. v. N. Telecom Ltd.</i> , 216 F.3d 1042, 1047-48 (Fed. Cir. 2000)).....	- 9 -
<i>Bourjaily v. United States</i> , 483 U.S. 171, 175-176 (1987).....	- 6 -
<i>Carnegie Mellon Univ. v Hoffman-LaRoche, Inc.</i> , 55 F. Supp. 2d 1024, 1032-33 (N.D. Cal. 1999).....	- 17 -
<i>Cordis Corp. v. Boston Sci. Corp.</i> , 658 F.3d 1347, 1357 (Fed. Cir. 2011)	- 13 -
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	<i>passim</i>
<i>In re Maxim Integrated Prod., Inc.</i> , No. 12-244, 2015 U.S. Dist. LEXIS 124062, 2015 WL 5311264, at *4 (W.D. Pa. Sept. 11, 2015).....	- 13 -
<i>Intellectual Sci. & Tech., Inc. v. Sony Elecs., Inc.</i> , 589 F.3d 1179, 1183 (Fed. Cir. 2009)	- 9 -
<i>Johnson v. Manitowoc Boom Trucks, Inc.</i> , 484 F.3d 426, 434 (6th Cir. 2007); ..	- 18 -
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 157 (1999).....	- 12, 15 -
<i>Macom Tech. Sols. Holdings, Inc. v. Infineon Techs. AG</i> , No. 2:16-cv-02859-CAS (PLAx), 2017 U.S. Dist. LEXIS 178845, at *14 (C.D. Cal. June 5, 2017); ...	- 10 -
<i>Magnetar Techs. Corp. v. Six Flags Theme Parks Inc.</i> , No. 07-127-LPS-MPT, 2014 U.S. Dist. LEXIS 15674, at *19-20 (D. Del. Feb. 7, 2014).....	- 9, 15 -
<i>Micro Chem., Inc. v. Lextron, Inc.</i> , 317 F.3d 1387, 1391-1392 (Fed. Cir. 2003); ..	- 6 -
<i>Morin v. McCulloch Corp.</i> , No. CV 01-6431 SVW (SHx), 2002 U.S. Dist. LEXIS 28196, at *6 (C.D. Cal. July 2, 2002)	- 6, 12, 18 -
<i>Mowry v. Viacom Int'l, Inc.</i> , 2005 U.S. Dist. LEXIS 15189, at *46 (S.D.N.Y. July 29, 2005)	- 16 -
<i>Pharmastem Therapeutics, Inc. v. Viacell, Inc.</i> , 491 F.3d 1342, 1354-55 (Fed. Cir. 2007).....	- 10 -
<i>Stambolian v. Novartis Pharm. Corp.</i> , No. CV 12-04378 BRO (FMOx), 2013 U.S. Dist. LEXIS 173016 (C.D. Cal. Dec. 6, 2013)	- 11 -
<i>Tamraz v. Lincoln Elec. Co.</i> , 620 F.3d 665, 677 (6th Cir. 2010);	- 11 -
<i>Uniloc USA, Inc. v. Microsoft Corp.</i> , 632 F.3d 1292 (Fed. Cir. 2015);.....	- 6 -
<i>Wellogix, Inc. v. Accenture, L.L.P.</i> , 716 F.3d 867, 881 (5 th Cir. 2013).	- 6 -
<i>Whirlpool Corp. v. LG Elecs., Inc.</i> , No. 1:04-CV-100, 2006 U.S. Dist. LEXIS 48698, at *23-24 (W.D. Mich. July 18, 2006);.....	- 10 -
Federal Rule of Evidence 702.....	<i>passim</i>

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Nuance Communications, Inc. (“Nuance”) respectfully moves the Court, pursuant to Federal Rule of Evidence (“Rule”) 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), to exclude the testimony of Plaintiff’s “personality” experts, Drs. Walters & Chaski, including the Infringement Reports of Drs. Walters & Chaski and the Rebuttal Invalidity Report of Dr. Walters. Nuance addresses Drs. Walters’ & Chaski’s qualifications, methodologies, and Infringement Reports in Section III and Walters’ Rebuttal Invalidity Report in Section IV, *infra*.

I. INTRODUCTION

Expert testimony is to be excluded where said testimony is not: (a) based in specialized knowledge that would be helpful to the trier of fact; (b) based on sufficient facts or data; (c) the product of reliable principles and methods; or (d) based on the reliable application of principles and methods to the facts of the case. Fed.R.Evid. 702. Eloqui’s experts meet none of these requirements.

The Asserted Patents in this matter cover virtual user interfaces (“VUIs”) with “personality”. Claim 43 of the parent ’938 Patent is representative:

A method for a voice user interface with personality, the method comprising:

storing a recognition grammar in a memory, the recognition grammar comprising multiple phrases that a virtual assistant with a personality can recognize when spoken by a user, the recognition grammar being selected based on the personality of the virtual assistant;

executing a voice user interface, the voice user interface outputting first voice signals, the voice user interface recognizing speech signals; and

controlling the voice user interface to provide the voice user interface with a verbal personality.

(6,144,938, Claim 43.)

The Accused Product is a platform upon which virtual assistants employing natural language can be built (the NINA platform, or “NINA”).

On May 2, 2018, this Court issued its Markman Order construing the

1 “personality” term as: “the totality of spoken language characteristics that simulate
 2 the collective character, behavioral, temperamental, emotional, and mental traits of
 3 human beings in a way that would be recognized by psychologists and social
 4 scientists as consistent and relevant to a particular personality type.” (Dkt. No. 154,
 5 at 9.) Disregarding the express language of the construction, Eloqui has proffered
 6 two *linguists* to opine on whether NINA has a personality type as employed in the
 7 Asserted Patents. These experts:

- 8 • admit that linguists are not qualified to opine upon personality types;
- 9 • admit they failed to assess the actual Accused Product;
- 10 • proffer reports unmoored from any standard or accepted methodology,
- 11 • fail to proffer any way to falsify their opinions. In fact, they admit that
- 12 falsification is impossible;
- 13 • rely solely upon marketing materials for their infringement opinions;
- 14 • ignore the Court’s claim construction; and
- 15 • have proffered opinions and methods untethered from their professional work
- 16 and research, and developed for the first time for this litigation.

17 Under well-established law, they should be excluded.

18 **II. LEGAL PRINCIPLES**

19 Federal Rule of Evidence 702 provides that expert testimony may be
 20 admitted only if it is “(1) based upon sufficient facts or data, (2) the product of
 21 reliable principles and methods, and (3) the witness has applied the principles and
 22 methods reliably to the facts of the case.” Expert testimony that fails to meet these
 23 criteria must be excluded. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292
 24 (Fed. Cir. 2015); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

25 Every trial court acts as a “gatekeeper” before admitting expert testimony at
 26 trial. *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391-1392 (Fed. Cir.
 27 2003); *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013).

1 “*Daubert* itself set forth a non-exclusive checklist for trial courts to use in
 2 assessing the reliability of scientific expert testimony.” *Morin v. McCulloch Corp.*,
 3 No. CV 01-6431 SVW (SHx), 2002 U.S. Dist. LEXIS 28196, at *6 (C.D. Cal. July
 4 2, 2002). The specific factors explicated by the *Daubert* Court are (1) whether the
 5 expert’s technique or theory can be or has been tested - that is, whether the expert’s
 6 theory can be challenged in some objective sense, or whether it is instead simply a
 7 subjective, conclusory approach that cannot reasonably be assessed for reliability;
 8 (2) whether the technique or theory has been subject to peer review and publication;
 9 (3) the known or potential rate of error of the technique or theory when applied; (4)
 10 the existence and maintenance of standards and controls; and (5) whether the
 11 technique or theory has been generally accepted in the scientific community. *Id.*
 12 (citing *Daubert*, 509 U.S. at 594.)

13 Where expert testimony is challenged, the proponent of expert testimony
 14 must establish its admissibility by a preponderance of the evidence. *Bourjaily v.*
 15 *United States*, 483 U.S. 171, 175-176 (1987). The district court acts as the
 16 gatekeeper and “must be assured that the proffered witness is qualified to testify”
 17 before admitting expert testimony at trial. *Wellogix*, 716 F.3d at 881 (citation and
 18 internal quotation omitted). Although vigorous cross-examination and presentation
 19 of contrary evidence are the traditional and appropriate means of attacking shaky
 20 evidence, that evidence must first be adjudged to be admissible. *Id.*

21 **III. ARGUMENT**

22 Eloqui proffered two experts to opine on whether NINA has a personality,
 23 Drs. Walters and Chaski, both are linguists, neither are trained in recognizing or
 24 assessing personality types.

25 **A. Drs. Walters & Chaski Are Not POSITA**

26 According to the definition of personality in the Asserted Patents and this
 27 Court’s claim construction, the “personality” term means “the totality of spoken
 28 language characteristics that simulate the collective character, behavioral,

1 temperamental, emotional, and mental traits of human beings in a way that would
2 be *recognized by psychologists and social scientists* as consistent and relevant to *a*
3 *particular personality type*.” (Dkt. No. 154, at 9, emphasis added; ’938 Patent,
4 3:24-30.) Thus, to be infringing, an accused product or method must meet all
5 limitations of the Asserted Claims, including have a particular personality type as
6 would be recognized by a psychologist or social scientist trained in recognizing
7 personality types. (*Id.*) The examples of personality types repeatedly provided in
8 the Asserted Patents are: friendly-dominant, friendly-submissive, unfriendly-
9 dominant, and unfriendly-submissive. (*See, e.g.*, ’938, 3:31-32.)

10 As such, here, “personality” does not mean personality in the lay sense (“she
11 has a nice personality”) but instead refers to a particular personality type as
12 recognized in the field of psychological personality typing. (*See* Markman Order,
13 at 6, “The specification discloses that the totality of spoken language characteristics
14 would be recognized in a way that is consistent and relevant as to a particular
15 ‘personality type,’ not just a particular personality.”)

16 Consistent with this Court’s construction of the personality term, the
17 Asserted Patents make clear, a person of skill in the art (“POSITA”) must be either
18 a psychologist or a social scientist trained in psychology. (*See* ’938, 3:24030;
19 *id.*, ’938, 5:11-12: “In particular, those skilled in the art of, for example, social
20 psychology”). The express teachings of the Asserted Patents and this Court’s
21 Markman aside, the “social scientist” referenced in the patent and this Court’s
22 construction must be trained in personality typology, else a social scientist such as a
23 historian or political scientist could be POSITA.¹

24 Undaunted by the Court’s Markman Order or the Asserted Patents’ definition
25 of POSITA, Eloqui has proffered two linguists as their “personality” experts. But,
26 linguistics as a field does not concern itself with personality typing and Eloqui’s
27

28 ¹ https://en.wikipedia.org/wiki/Social_science

1 experts have no training at all in personality typing. One of Eloqui's proffered
2 experts, Dr. Walters, flatly admits that his opinion is not based on scientific analysis
3 from the field of linguistics, but rather on his opinion about how users subjectively
4 perceive human-computer interfaces like NINA:

5 Q. So if you were going to give advice to another linguist, another linguist
6 calls you up and says, I heard you did this, I heard you assessed the
7 personality of virtual assistant, tell me how to do that? How would you
8 advise him or her?

9 A. I'm uncomfortable with the way you phrase the question.

10 Q. Please rephrase it for me.

11 A. I don't perceive that I have assessed the personality of a virtual
12 assistant.

13 I am not a diagnostician and I'm certainly not a personality
14 psychologist. So I am neither trained nor authorized to start attaching
15 labels, certainly not clinical labels, in cases like this. Okay. *As a*
16 *human being I see the NINA video and I have a response*. But that's
17 different from a clinician who is authorized to, on the basis of
18 whatever evidence they feel they might need, make an assessment.

19 Q. I understand. And that's why you were, I think, talking about how the
20 user interacts with NINA.

21 A. Right.

22 Q. *So your opinion was not, I've identified a personality type in NINA*
23 *and this is it.*

24 A. *Right.*

25 Q. You didn't do that. Is that correct? You didn't do that?

26 A. That's a fair assessment, yes.

27 Q. You looked at all the evidence and you said it's clear to me that the
28 *users perceived* NINA as having a personality?

A. Yes.

Q. And you also looked at marketing materials from Nuance where
Nuance is saying hey, we built this thing with a persona. Maybe they
didn't use –

A. Personality. Exactly. Sure.

Q. Correct. Okay.

A. Right.

1 Q. So you couldn't, then -- or you corrected me. You wouldn't, then, say
2 to a colleague, here's how you assess the personality type of NINA?

3 A. ***No. I don't assess anyone's personality, whether human or dead***
4 ***plants. I don't assess their personalities.*** Right.

5 (Walters Depo Tr., 72:17-75:19, Lamkin Decl., Exh. A, emphasis added.)

6 **B. Drs. Walters & Chaski Never Reviewed The Actual Accused**
7 **Product Or Its Software**

8 The "patentee's expert must set forth the factual foundation for his
9 infringement opinion in sufficient detail for the court to be certain that features of
10 the accused product would support a finding of infringement under the claim
11 construction adopted by the court[.]" *Magnetar Techs. Corp. v. Six Flags Theme*
12 *Parks Inc.*, No. 07-127-LPS-MPT, 2014 U.S. Dist. LEXIS 15674, at *19-20 (D.
13 Del. Feb. 7, 2014) (*quoting Intellectual Sci. & Tech., Inc. v. Sony Elecs., Inc.*, 589
14 F.3d 1179, 1183 (Fed. Cir. 2009) (*citing Arthur A. Collins, Inc. v. N. Telecom Ltd.*,
15 216 F.3d 1042, 1047-48 (Fed. Cir. 2000))). ***Incredibly, neither Dr. Walters nor Dr.***
16 ***Chaski analyzed an actual embodiment of the Accused Device.*** Dr. Walters
17 admits that he never reviewed the actual Accused Product:

18 A. Paragraph 69, IX, [of expert report] is labeled, Summary of
19 Infringement Opinion. And that's where I state -- I seek to summarize
20 what I understand about the product in question, NINA.

21 Q. When you say that you have examined the virtual assistant, what do
22 you mean?

23 A. What I have examined -- what do I mean by examined? I mean that I
24 have looked at, as stated in the opinion, I have looked at information
25 online about NINA. I have watched videos, both the -- I guess I'll call
26 it an advertisement for NINA. Where NINA is literally personified.
27 Okay? So I've done that. But, then, other videos where either the firm
28 is advertising NINA to potential consumers or where people on the
product development team are talking about NINA and what NINA
can and can't do or talking about voice user interfaces more broadly.

Q. I was trying to understand, and forgive me if my question was poorly
formed. We're going to look at the references that you cited and talk
about them.

A. Okay.

1 Q. I didn't see a reference to the actual product, a working embodiment of
 2 NINA. And so I'm asking you, did you actually get to play with,
 3 examine a working embodiment of a virtual assistant built on the
 NINA platform?

4 A. No, I did not.

5 (Walters Depo Tr. 29:10- 30:13, Lamki Decl., Exh. A.)

6 Dr. Chaski likewise never analyzed the actual Accused Product but merely
 7 scanned marketing materials. (Chaski Report, Lamkin Decl., Exh. C.) They should
 8 be excluded on that basis alone. See *Macom Tech. Sols. Holdings, Inc. v. Infineon*
 9 *Techs. AG*, No. 2:16-cv-02859-CAS (PLAx), 2017 U.S. Dist. LEXIS 178845, at
 10 *14 (C.D. Cal. June 5, 2017); *Whirlpool Corp. v. LG Elecs., Inc.*, No. 1:04-CV-100,
 11 2006 U.S. Dist. LEXIS 48698, at *23-24 (W.D. Mich. July 18, 2006); *Pharmastem*
 12 *Therapeutics, Inc. v. Viacell, Inc.*, 491 F.3d 1342, 1354-55 (Fed. Cir. 2007).²

13 There is no indication in either Dr. Chaski's or Dr. Walters' reports that they
 14 reviewed NINA's software, produced to Eloqui in June of 2017. (See Lamkin
 15 Decl., Exhs. B,C.)

16 **C. There Is No Accepted Methodology For Personality Typing In The**
 17 **Field Of Linguistics**

18 Dr. Walters also admits that no linguist to his knowledge has ever assessed
 19 the personality type of a VUI:

20 Q. My recollection is [in your expert report] you didn't cite to any work
 21 from the field of linguistics on assessing the personality of a virtual
 assistant?

22 A. No, because to my knowledge none exist.

23 (Walters Depo Tr. 77:19-22, Lamki Decl., Exh. A.)

24 Q. Can you walk me through the methodology you used to conclude that
 25 NINA has a personality for this litigation?

26 . . .

27 ² Further, none of Eloqui's marketing materials state that NINA has a personality
 28 type as defined in the Asserted Patents. Neither Dr. Walters nor Dr. Chaski point to
 a single statement from Nuance that VUI's built upon NINA have personality types
 as defined in the Asserted Patents.

1
2 Q. So if you took, for example, the speech act, the NINA speech act?

3 ...

4 Q. Did you compare that speech act to other research done in speech acts
5 of virtual assistants and personality typing of their speech acts?

6 A. No. To my knowledge there is no such research.

7 ...

8 Q. My recollection [of your report] is you didn't cite to any work from the
9 field of linguistics on assessing the personality of a virtual assistant?

10 A. No, because to my knowledge none exist.

11 ...

12 Q. until you did this [report], there weren't any other linguists that put
13 together the methodology in the report that you put together or this
14 litigation?

15 A. Not to my knowledge.

16 Q. So there are no peer review studies on linguists assessing personality
17 type of virtual assistants?

18 A. No. And I wouldn't expect there to be.

19 (*Id.*, 61:22-24, 63:21-25, 77:19-22, 79:3-7.)

20 "[W]hat science treats as a useful but untested hypothesis the law should
21 generally treat as inadmissible speculation." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d
22 665, 677 (6th Cir. 2010); *see also Stambolian v. Novartis Pharm. Corp.*, No. CV
23 12-04378 BRO (FMOx), 2013 U.S. Dist. LEXIS 173016 (C.D. Cal. Dec. 6, 2013)
24 (*citing Tamraz* with approval).

25 **D. Dr. Chaski's Testimony Is Subjective, Not Based On Any Accepted**
26 **Methodology, & Ignores The Court's Claim Construction**

27 As noted, Dr. Chaski is a linguist with no training in personality type
28 assessment. (Lamkin Decl., Exh. C.) The substantive portion of her report

comprises a mere six (6) paragraphs. (*Id.*, at ¶¶14-19.) Dr. Chaski never examines the actual Accused product or the software comprising the Accused Product, produced to Eloqui in June 2017. (*Id.*) Instead, in those few paragraphs, Dr. Chaski provides (1) an entirely subjective opinion; (2) fails to cite any evidence that her technique or theory has been subject to peer review and publication; (3) fails to cite any known or potential rate of error for her technique or theory; (4) fails to cite the existence and maintenance of standards and controls; and (5) fails to note whether her technique or theory has been generally accepted in the scientific community. See *Morin v. McCulloch Corp.*, No. CV 01-6431 SVW (SHx), 2002 U.S. Dist. LEXIS 28196, at *6 (C.D. Cal. July 2, 2002) (*citing Daubert*, 509 U.S. at 594.) In fact, Dr. Chaski fails to cite any technique or theory at all. She simply concludes, *ipse dixit*, that NINA has a personality type. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (“nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”) (*citing Daubert*, 522 U.S. at 146.)

Dr. Chaski opines:

18. Personality Must Be Recognizable as a Particular Type

Nuance provides the following commentary about Nina with regard to personality types, suggesting at least three:

A digital persona who delivers personalized, effortless customer service via a human-like conversational interface. Nina can be the *ambassador* for your brand, the *all-knowing guide* to our content, or the *reassuring voice* of your customer service organization.
<https://web.archive.org/web/20140114164040/http://www.nuance.com:80/landing-pages/products/nina/default.asp> from 14 January 2014; accessed 21 May 2018

1 (Lamkin Decl., Exh. C, at 15.)

2 That's it. Chaski cites one piece of marketing material from Nuance's
3 website and concludes that NINA has at least three personality types: (1)
4 ambassador; (2) all-knowing guide; and (3) reassuring voice. These purported
5 personality types bear no resemblance to those listed as examples in the Asserted
6 Patents. (*See* '938, 3:31-32.) They are not "particular personality types"
7 recognized by a psychologist and, as such, ignore this Court's claim construction.
8 *See Cordis Corp. v. Boston Sci. Corp.*, 658 F.3d 1347, 1357 (Fed. Cir. 2011) (when
9 an expert's testimony is based on an "incorrect understanding of the claim
10 construction," the Court "must disregard the testimony."); *In re Maxim Integrated*
11 *Prod., Inc.*, No. 12-244, 2015 U.S. Dist. LEXIS 124062, 2015 WL 5311264, at *4
12 (W.D. Pa. Sept. 11, 2015) ("It is well-settled that an expert can offer an opinion on
13 how a court's claim construction should be applied to the facts of a case, but cannot
14 offer an opinion that contradicts or disregards a court's claim construction
15 rulings.")

16 Dr. Chaski fails to provide any evidentiary support for her opinion that those
17 three marketing descriptors are examples of personality types recognized in the
18 field of personality typing. Dr. Chaski is simply winging it.

19 When asked in deposition about Dr. Chaski's methodology, Dr. Walters
20 admitted that her methodology was not rooted in any generally accepted
21 methodology in the field of linguistics:

22 Q. You do know that Eloqui has a second linguist as an expert in this
23 case?

24 A. Yes, I do.

25 Q. Dr. Chaski?

26 A. Yes.

27 Q. And did you read her report?

28 A. Yes. I skimmed it.

1 Q. And in that report Dr. Chaski sets forth a methodology. What did you
2 see as the similarities between your methodology and Dr. Chaski's
methodology?

3 A. May I see a copy of her report?

4 Q. Of course. Im going to mark as Defendant's Exhibit 3 the expert report
5 of Dr. Carole Chaski. (Exhibit 3, Expert Report of Carole Chaski (No
Bates), was marked.)

6 ... Q. If you look, sir, on page 15.

7 A. Yes.

8 Q. She opines that personality must be recognizable as a particular type.

9 A. Right.

10 Q. She draws from that the conclusion that she is, in fact, tasked with
11 identifying a particular personality type.

12 A. Right.

13 Q. And the three personality types that she concludes NINA possess –

14 A. Right.

15 Q. -- are ambassador, all-knowing guide, and reassuring voice.

16 A. Uh-huh. Uh-huh. Uh-huh.

17 Q. ***Is there something in the linguistic literature that I can look to to
understand what a linguist means by an ambassador personality
type?***

18 A. ***I would think not.***

19 Q. So you will agree with me that in the field of linguistics there isn't a
20 typology that includes ambassador personality type?

21 A. Yes. I would agree.

22 (Walters Depo Tr., 84:14-86:23, 94:14-17, Lamkin Decl., Exh. A.)

23 Chaski's opinion, based solely upon Nuance's marketing materials, is not the
24 subject of expert testimony. *Kumho Tire*, 526 U.S., at 157; *see also Magnetar*
25 *Techs. Corp. v. Six Flags Theme Parks Inc.*, No. 07-127-LPS-MPT, 2014 U.S. Dist.
26 LEXIS 15674, at *38 (D. Del. Feb. 7, 2014) ("*Ipse dixit* is defined as 'something
27 asserted but not proved,' which exemplifies [Chaski's] expert report.")

28 Dr. Walters also admits that Mr. Chaski's opinions are not falsifiable:

1 Q. Outside of Nuance's marketing materials –

2 A. Right.

3 Q. -- from your field –

4 A. Right.

5 Q. -- what would I look to see if [Chaski's infringement opinion] is a
6 valid conclusion? How would I understand – more importantly, as to
the conversation earlier, how would I falsify this conclusion?

7 A. If we can find evidence that elsewhere minimally Nuance says, but
8 whatever else NINA is, she's not an ambassador, that would clearly be
direct contradiction and falsification. I'll say.

9 Q. Agree, of course, but let's stick – that's Nuance's materials. I'm talking
10 about from the field of linguistics. What do I look at -- what do I look
to to falsify her conclusion that NINA has an ambassador personality
11 type?

12 A. I think as she has interpreted personality type it's going to be very,
13 very difficult to falsify the argument. Because she is relying on what
Nuance itself has said about its product.

14 (Chaski Depo Tr., 89:18-90:15.)

15 Chaski's opinions should also be excluded because they are not falsifiable, as
16 noted by Dr. Walters, *supra*. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S.
17 579, 593 (1993) (“Ordinarily, a key question to be answered in determining
18 whether a theory or technique is scientific knowledge that will assist the trier of fact
19 will be whether it can be (and has been) tested. ‘Scientific methodology today is
20 based on generating hypotheses and testing them to see if they can be falsified;
21 indeed, this methodology is what distinguishes science from other fields of human
22 inquiry.’”).

23 At every turn, Dr. Chaski's report triggers the gate-keeping responsibilities of
24 this Court under Rule 702 and *Daubert*. See *Mowry v. Viacom Int'l, Inc.*, 2005 U.S.
25 Dist. LEXIS 15189, at *46 (S.D.N.Y. July 29, 2005) (excluding Chaski; *citing*
26 *Daubert*: Expert opinions “should be excluded when not known by other experts,
27 not having been the subject of peer review, and not having gained acceptance in the
28 specialized knowledge community.”)

1 Dr. Chaski has previously been excluded for methods even less egregious
2 than those employed here. *See Mowry, at *51* (striking Dr. Chaski's opinions for,
3 *inter alia*, proffering opinions unsupported in her field).

4 Dr. Chaski's report violates every known safeguard under Rule 702 and
5 *Daubert*. Her report and testimony should be excluded.

6 **E. Dr. Walters Admits That His (And Dr. Chaski's) Opinions Are**
7 **Subjective And Not Scientific**

8 In his deposition, Dr. Walters admitted that, using his and Dr. Chaski's
9 subjective methodology, two linguists might assign two different personalities to
10 the Accused Device. (Walters Depo Tr., 130:5-139:20.) He further admits that it is
11 possible that two linguists could come to different infringement opinions when
12 looking at the same device where, as here, there is an "N of two," *i.e.*, where only
13 two linguists (Walters and Chaski) are opining on the personality of the Accused
14 Device. (*Id.*) But expert opinion cannot be based on "subjective belief or
15 unsupported speculation." *Daubert*, 509 U.S. at 590. Drs. Walters' and Chaski's
16 opinions simply cannot meet Rule 702's "exacting standards" of reliability. *See*
17 *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

18 **F. Actual Experts Have Determined That The Connection Between**
19 **Language and Personality Type is "Weak"**

20 In his deposition, Dr. Walters admits to not being aware of any linguists
21 doing work on the connection between language and personality type, *supra*.
22 However, in his deposition, Dr. Walters was presented with research in the field,
23 and the conclusion that any purported link between language and personality type is
24 in fact scientifically "weak". (Walters Depo Tr., 205:2-210:13.) Upon review, Dr.
25 Walters admits that any purported connection between language and personality
26 type is "attenuated". (*Id.*) And that he was not aware of any studies that reliably
27 draw a correlation between language and personality type. (*Id.*, 209:8-210:13.) In
28 other words, Dr. Walters admits that the very methodology that would be employed

1 in his field (linguistics, the study of language) in fact cannot be employed reliably
 2 because any connection between language and personality type is scientifically
 3 (statistically) “weak”. Here, the relevant scientific community, linguistics, not only
 4 doesn’t accept Drs. Walters and Chaski’s methods (to the extent any methods can
 5 be gleaned from their reports), the scientific community concluded there is only a
 6 weak connection between language and personality type. *Carnegie Mellon Univ. v*
 7 *Hoffman-LaRoche, Inc.*, 55 F. Supp. 2d 1024, 1032–33 (N.D. Cal. 1999) (“A
 8 reliability assessment . . . does permits explicit identification of a relevant scientific
 9 community and an express determination of a particular degree of acceptance
 10 within that community.”) (*quoting Daubert*, 509 U.S. at 594). The methodology of
 11 Chaski and Walters (again, to the extent any methodology can be ascertained), is
 12 not only not generally accepted, its undermined and refuted.

13 **G. Dr. Walters Methodology And Opinions Were Devised For This**
 14 **Litigation**

15 “One *very significant fact to be considered* is whether the experts are
 16 proposing to testify about matters growing naturally and directly out of research
 17 they have conducted independent of the litigation, or whether they have developed
 18 their opinions expressly for purposes of testifying.” *Daubert*, 43 F.3d at 1317. Dr.
 19 Walters admits that his methodology and opinions were created whole cloth for this
 20 litigation:

21 Q. To be clear, you’ve never been asked to assess the personality of a
 22 virtual assistant before?

23 A. No, I have not.

24 Q. So the reports that you submitted in this case, those opinions were
 25 drafted for this litigation and for the first time?

26 A. Right. Yes, they were.

27 Q. And you didn’t reference any other linguist’s work on assessing the
 28 personality of virtual assistant because, to your knowledge, there

1 haven't been any?

2 A. Right.

3
4 (Walters Depo Tr., 201:4-16.)

5 Similarly, Dr. Chaski's methods and opinions were devised solely for this
6 litigation. (*See* Exh. C., Chaski CV.) As such, they must be viewed with suspicion.
7 *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434 (6th Cir. 2007);
8 *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1317 (9th Cir. 1995); *Morin v.*
9 *McCulloch Corp.*, No. CV 01-6431 SVW (SHx), 2002 U.S. Dist. LEXIS 28196, at
10 *7 (C.D. Cal. July 2, 2002).

11 In his deposition, Dr. Walters was honest and affable. He may very well be
12 qualified to opine on subjects pertaining to linguistics. But his opinions here
13 violate each and every gating category under Rule 702 and *Daubert*. There is
14 simply no basis for allowing Dr. Walters to testify as to whether a VUI has a
15 personality type.

16 **IV. DR. WALTERS' "REBUTTAL INVALIDITY REPORT" IS A**
17 **RUSE**

18 Pursuant to this Court's Scheduling Order, Eloqui was permitted to file a
19 rebuttal invalidity report but was not permitted to file a rebuttal to Nuance's rebuttal
20 infringement report. (Dkt. Nos. 25, at 2; 154, at 10.) That is, Eloqui was to file an
21 infringement report and then Nuance was to rebut that report, thus ending the
22 rounds of infringement reports. (*Id.*) Characteristically undaunted by this Court's
23 Orders, Eloqui filed a rebuttal, rebuttal infringement report but called it a "Rebuttal
24 Invalidity Report". (Lamkin Decl., Exh. D.)

25 Pursuant to the Scheduling Order, on May 21, 2018, Eloqui served its expert
26 infringement reports, including the reports of Drs. Walters and Chaski. On June 18,
27 2018, Nuance served its expert reports, including the Rebuttal Infringement Report
28 of Dr. Robins. (Dr. Robins is a professor of psychology and a renowned expert in

1 personality typology.) The only remaining reports to be served were Eloqui's
2 rebuttal to Nuance's invalidity reports. (Dkt. Nos. 25, at 2; 154, at 10.) But Eloqui
3 repeatedly refuses to be caged by items so trivial as a court order and on July 16,
4 2018, Eloqui served upon Nuance Dr. Walters' Rebuttal Invalidity Report, a
5 rebuttal invalidity report only in title.

6 In deposition, before the lunch break, Dr. Walters testified:

7 Q. When I asked you what you might look to to support your opinion that
8 "friendly" is a personality type in the field of linguistics, you corrected
9 me by saying no, it's an observation.

10 A. Yes.

11 Q. Is it your observation or is there some sort of literature I can go to in
12 support of that observation?

13 A. I think there's empirical research that can be done. There is not -- I
14 don't think you're going to find resources that will say linguists
15 contend that friendly is a personality type.

16 What you will do, for example, if you -- what you will find, if you
17 look at the research talked about in the appendix to the rebuttal
18 [report], is you will find that -- that social psychologists and
19 sociolinguists are simply using these characteristics, what they term
20 personality characteristics in a way that is comparable to the way that
21 the Court defines personality, personality type.

22 Q. We'll talk about the Report No. 2 later this afternoon.

23 A. Sure. Uh-huh.

24 Q. You understand that Report No. 2 is a rebuttal invalidity report?

25 A. Yes.

26 Q. And that nothing in the scheduling order permitted you to talk about or
27 rebut Dr. Robins' infringement opinion in an invalidity rebuttal report;
28 that was explained to you?

1 A. No, it was not. I was simply asked to compose a rebuttal and I did.

2
3 (Walters Depo Tr., 46:15-47:23.)

4 After lunch Dr. Walters testified:

5 Q. You had testified earlier today that you were asked to rebut the
6 opinions in Dr. Robins' report?

7 A. It's probably fair to say that I was asked to file a rebuttal report. That's
8 slightly different from rebutting the opinions, I think, and I think that's
9 a key thing, to simply evaluate what was there in light of my
10 knowledge, training, and experience as a linguist.

11 Q. You understand that Dr. Robins has two reports?

12 A. Exactly, yes.

13 Q. And were you asked to rebut both reports?

14 A. No, only one of them.

15 Q. Which report were you asked to rebut?

16 A. It's the invalidity report.

17 Q. Okay. Please, would you point me to in your report where you discuss
18 invalidity? Not the legal citations, but the portions of your opinion that
19 actually address invalidity.

20 A. There is not a section that says here's why Robins' report is invalidity
21 -- is invalid. What I am seeking to do is demonstrate how a linguist
22 with my training and experience would understand the Court's
23 construction personality and to demonstrate why it is much broader
24 than Dr. Robins'. Because I had said the Court will have to decide
25 whether this knowledge is useful.

26 Q. Agreed. Earlier today I asked you a series of questions about your
27 methodology.

28 A. Right.

1 Q. And you repeatedly referred me to this [rebuttal] report.

2 A. Right.

3
4 Q. So I had asked you repeatedly about your infringement methodology.

5 A. Right.

6 Q. And you cited this [rebuttal] report to me.

7
8 A. Right.

9 Q. So this [rebuttal] report actually concerns your further understanding
10 of -- you said earlier that you had read Dr. Robins' infringement report
11 and realized the claim construction --

12 A. Right.

13 Q. You learned something new about the claim construction.

14 A. Right. As he [Dr. Robins'] perceives it, yes.

15
16 Q. And you address your new conclusions in this second report?

17 A. Right. And I also provided information to support my claim that even
18 social psychologists, there are psychologists including social
19 psychologists who views terms like personality, personality
20 characteristics, traits, et cetera, in a far broader way than Professor
Robins does.

21 Q. Understood. So you read Dr. Robins' infringement report and you
22 realize he's talking about what you call the narrow.

23 A. The narrow technical, right, definition.

24 Q. And so then you went back and did additional research, additional
25 consideration --

26
27 A. Right.

28 (Walters Depo Tr., 168:6-170:17; *see also id.*, 55:13-18, 195:24-196:12.)

1 In fact, when asked about his infringement methodology in his deposition,
2 Dr. Walters cites his rebuttal report more than fifty (50) times and offers—and
3 based on said report—offers a completely new infringement theory (called the
4 continuum infringement theory, which completely disregards the Court’s
5 construction of the personality term. (*See e.g.*, Walters Depo Tr., 37:1-25.)

6 And, Dr. Walters’ invalidity rebuttal report never addresses invalidity:

7 Q. . . . In your rebuttal report do you take any positions on whether or not
8 the patents themselves are bad? In other words, do you offer an
9 opinion that personality existed since the dawn of time so the patents
are bad?

10 A. No, I do not.

11 Q. There are some [prior art] charts. Do you take a position on those
12 charts in your rebuttal report?

13 A. Not in the rebuttal report.

14 Q. In the -- we call them prior art charts.

15 A. ... No I do not.

16 (Walters Depo Tr., 195:24-196:12; *see also* Lamkin Decl., Exh. D.)

17 And:

18 A. What I do try to do there [in rebuttal report] is begin by summarizing
19 what I see the two major categories of claims that Professor Robins
20 made to be. The first is his -- his defining of the term “personality”
21 and therefore his conclusion that the only person or the only group of
22 people who should be entitled to offer an opinion about anything
23 having to do with personality would be people with education,
24 training, and practical experience comparable to his.

25 . . .

26 Q. You would agree with me that Dr. Robins appears highly qualified to
27 opine on that technical . . .

28 A. Of course. Of course. Yes.

1
2 Q. One of the eminent experts in personality.

3 A. There's no -- there should be -- I've never met the man, but there
4 should be no question about that. Yeah. None at all.

5 (*Id.*, at 171:19-174:20.)

6 In other words, in his Rebuttal Infringement Report, Dr. Robins opined,
7 respectfully, that linguists were not qualified to opine upon whether or not NINA
8 infringes the “personality” term as defined in the Asserted Patents and as construed
9 by this Court. Again undaunted, and instead of moving the Court for permission to
10 serve a rebuttal, rebuttal report, Eloqui simply filed a second infringement report,
11 with a new claim construction and a new infringement theory, and labeled it a
12 rebuttal invalidity report. (*See* Lamkin Decl., Exh. D.) Dr. Walters’ Rebuttal
13 Invalidity Report should be excluded.

14 V. CONCLUSION

15 Eloqui has proffered two linguists to opine on whether NINA has a
16 personality type as employed in the Asserted Patents. These experts:

- 17 • admit that linguists are not qualified to opine upon personality types;
- 18 • admit they failed to assess the actual Accused Product;
- 19 • proffer reports unmoored from any standard or accepted methodology,
- 20 • fail to proffer any way to falsify their opinions and in fact admit that
- 21 falsification is impossible;
- 22 • rely solely upon marketing materials for their infringement opinions;
- 23 • ignore the Court’s claim construction; and
- 24 • have proffered opinions and methods that are untethered from their
- 25 professional work and research.

26 Further, Eloqui has proffered a “Rebuttal Invalidity Report” is a ruse; it’s a
27 blatant attempt to circumvent this Court’s Scheduling Order in order to try to save
28

1 Eloqui from the case-ending non-infringement opinions in Dr. Robins'
2 infringement report.

3 Under well-established law, Drs. Walters and Chaski's testimony and report
4 should be excluded.

5 Dated: August 15, 2018

LAMKIN IP DEFENSE

7 By: Rachael D. Lamkin

8 Rachael D. Lamkin
9 Lamkin IP Defense

10 Attorneys for Defendant
11 Nuance Communications, Inc.

12
13 **CERTIFICATE OF SERVICE**

14 On this date, August 15, 2018, the following documents were served upon
15 Eloqui's counsel of record through the Court's ECF system:

16
17 **DEFENDANT NUANCE COMMUNICATIONS, INC.'S NOTICE OF**
18 **MOTION AND MOTION UNDER FRE 702 & DAUBERT TO EXCLUDE**
19 **EXPERT TESTIMONY OF DRS. WALTERS & CHASKI;**
20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **LAMKIN DECL ISO**
22 **EXHIBITS THERETO**

23 Rachael D. Lamkin

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28